U.S. Department of Labor

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Office of Administrative Law Judges
50 Fremont Street
Suite 2100
San Francisco, CA 94105

In the Matter of

WILLIAM BROWN,

Claimant,

v.

NATIONAL STEEL AND SHIPBUILDING COMPANY,

Employer.

DATE: DECEMBER 20, 1999

CASE NO. 1999-LHC-1192

OWCP NO. 18-64378

Appearances

PRESTON EASLEY, Esq.

For the Claimant

ROY D. AXELROD, Esq.

For the Employer

Before: Edward C. Burch
Administrative Law Judge

DECISION AND ORDER— AWARDING BENEFITS

Claimant seeks benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq*. ("the Act"). A formal hearing was held before the undersigned on October 6, 1999, in San Diego, California. At the hearing, the parties stipulated that: (1) Claimant sustained carpal tunnel injuries to both wrists on October 5, 1996, while he was in the scope and course of his employment with Respondent; (2) Claimant's carpal tunnel syndrome is a scheduled injury under the Act; (3) the parties are subject to the Act; (4) notice, filing, and controversion were timely; (5) Claimant's average weekly wage was $558.80 per week at the time of the injury and his compensation rate was $372.53 per week; (6) Claimant reached the point of maximum medical improvement on December 8, 1998; (7) medical treatment for carpal tunnel syndrome has been provided in the past and will be provided in the future; (8) the Form LS-208 Notice of Final Payment or Suspension of Compensation Payments is an accurate reflection of prior compensation paid to date both at the federal and state level; and (9) Respondent is entitled

to credit for payments made under the State Act. I find that these stipulations are supported by the evidence and in accordance with the law.

The issues remaining for adjudication are: (1) the nature and extent of Claimant's disability; (2) whether Claimant is entitled to compensation for temporary total disability while undergoing vocational rehabilitation under the State Act; (3) whether Claimant's carpal tunnel injury constitutes a scheduled injury to the arms pursuant to Section 8(c)(1) or a scheduled injury to the hands pursuant to Section 8(c)(3); and (4) the percentage of permanent partial impairment as a result of Claimant's carpal tunnel syndrome.

Findings of Fact and Conclusions of Law

Claimant is a 37 year old male who was previously employed by Respondent, National Steel and Shipbuilding Company, as a journeyman shipfitter. (TR 10-11)[1] The parties do not dispute that Claimant sustained an industrial injury arising out of and in the course of his employment with Respondent to his left and right hands and wrists (bilateral carpal tunnel syndrome) due to a cumulative trauma injury at work through October 5, 1996. (TR 11)

Medical Evidence

Claimant first sought treatment from Dr. Thomas J. Kennedy on December 12, 1996. (RX 14:55) Claimant informed Dr. Kennedy that in August of 1996 he first noticed cramping and discomfort in his right hand and also leading from his right hand up to his elbow. Claimant later noticed a tingling and numbing sensation in both hands. (RX 14:56) Dr. Kennedy's impression was bilateral flexor tendon tenosynovitis, bilateral carpal tunnel syndrome, and bilateral ulnar nerve impingement at the wrist. Dr. Kennedy ordered cortisone shots for Claimant's wrists and stated Claimant was able to perform modified work duties. (RX 14:59, 63)

On July 7, 1997, Dr. Kennedy opined that Claimant was permanent and stationary but that he was precluded from vibratory tool use with either hand. (RX 14:75) Dr. Kennedy also noted that Claimant still had some fatigability, numbness, tingling, and cramping in his hands. (RX 15:73) Dr. Kennedy further stated that Claimant's criteria for disability under the American Medical Association *Guides to the Evaluation of Permanent Impairment, Fourth Edition*, (*AMA Guides*) was zero, in that Claimant had normal range of motion and normal grip without significant pain. (RX 15:75) In a letter dated August 1, 1997, Dr. Kennedy stated that although Claimant was permanent and stationary, he was not able to return to his usual and customary job as a shipfitter due to his inability to use vibratory tools. (RX 15:78)

On October 21, 1997, Claimant was examined by Dr. Sidney H. Levine where he

[1] The following abbreviations will be used: TR = transcript of the hearing on October 6, 1999; CX = Claimant's exhibits; and RX = Respondent's exhibits. At the hearing, Claimant's exhibits 1-10 and Respondent's exhibits 1-26 were admitted into evidence.

complained of pain in both wrists and hands. Claimant informed Dr. Levine that the pain extended into his thumb and up into his forearm on the right. (CX 6:39) Dr. Levine recommended a neurological evaluation and electrical studies. (CX 6:43) On December 12, 1997, Claimant returned to Dr. Levine where he stated he was experiencing increased pain and numbness in both of his wrists, cramping that extended into the ring and fifth fingers, and pain in the base of his thumb. Dr. Levine noted that Claimant's neurological evaluation and electrical studies revealed bilateral median neuropathy secondary to carpal tunnel syndrome. (CX 6:34)

The medical reports indicate that Claimant's symptoms became worse at the beginning of 1998, and Dr. Levine recommended surgery. Claimant underwent right carpal tunnel release on February 25, 1998, and left carpal tunnel release on June 10, 1998. (CX 6:23-24) On August 25, 1998, Claimant was seen by Dr. Levine where he complained of increased pain in his left wrist, numbness in his ring and fifth fingers, a weak grip, and pain with repetitive grasping. (CX 6:21) On September 25, 1998, Claimant returned to Dr. Levine where he complained of numbness in the ring and fifth fingers of his left hand and soreness with repetitive gripping. (CX 6:18)

On December 8, 1998, Dr. Levine opined that Claimant's condition was permanent and stationary. (CX 6:10) Claimant informed Dr. Levine that he still experienced intermittent pain, he had a weak grip, and that his fifth and ring fingers go numb when he bends his elbow for more than 15 minutes. Dr. Levine's findings revealed limited range of motion in Claimant's wrists and decreased grip strength. (CX 6:9) Dr. Levine utilized the *AMA Guides* to rate Claimant's disability as a result of his carpal tunnel syndrome. Dr. Levine stated that "utilizing Table #16 on page 57, median nerve at the wrist, moderate, there is a 20 percent impairment of the upper extremity. Ulnar nerve at the wrist, mild, there is 10 percent impairment of the upper extremity. Utilizing the *Combined Values Chart* on page 322, 10 percent combined with 20 percent is equal to 28 percent impairment of the right upper extremity. There would also be 28 percent impairment of the left upper extremity. Combining 28 percent with 28 percent, there is a 48 percent impairment of the upper extremity." (CX 6:11) Dr. Levine concluded that Claimant was no longer capable of carrying out the regular duties of his former occupation and should be retrained for employment compatible with his level of disability. (CX 6:11)

Claimant returned to Dr. Kennedy on December 18, 1998. Claimant told the doctor that he no longer had the extreme numbness and tingling in his hands but that he had no strength or endurance. Claimant also stated his little and ring fingers go numb when his elbows are bent. (RX 15:82) Dr. Kennedy opined that according to the *AMA Guides*, Claimant had zero residual disability and was capable of continuing at full duty as a printing press operator. (RX 15:87)

On January 28, 1999, Claimant was examined by Dr. Christopher Brigham. Dr. Brigham critiqued the evaluations of Dr. Kennedy and Dr. Levine and provided his own conclusion regarding Claimant's permanent impairment rating. Dr. Brigham stated that he agreed, overall, with Dr. Kennedy's conclusion that Claimant had a zero percent impairment rating and disagreed with Dr. Levine's conclusion that Claimant had a 28 percent impairment rating for each upper extremity. Dr. Brigham opined that Dr. Levine's permanent impairment rating is inconsistent with

the documented physical examination findings and is not in accordance with the *AMA Guides*. (RX 16:91) After reviewing the clinical findings, Dr. Brigham stated that there appeared to be no objective evidence of sequelae either motor or sensory following his releases for entrapment. Dr. Brigham concluded that, based on the *AMA Guides*, Claimant has a one percent upper extremity impairment for each upper extremity. (RX 16:92)

In a letter to Respondent's attorney, dated September 9, 1999, Dr. Brigham stated that although he opined in his January 28, 1999, report that Claimant had a one percent impairment of the upper extremity, it would be reasonable to give Claimant the benefit of the doubt and stipulate to a two percent upper extremity impairment. Dr. Brigham stated that "[a]ccording to Table 2. Relationship of Impairment of the Hand to Impairment of the Upper Extremity (page 19) a 2 % upper extremity impairment is equivalent to a 2% hand impairment. Therefore, [Claimant's] final impairment is a 2% hand impairment for each hand." (RX 26:252)

Claimant testified at his deposition on September 4, 1999, that he did not see much improvement in his symptoms following his carpal tunnel surgeries. (RX 25:217) Claimant also testified that he had symptoms in his fingers, hands, and wrists. (RX 25:247) At the formal hearing on October 6, 1999, Claimant testified that he still had pain, numbness in his fingers, cramping in his hands, lack of strength, and scar tissue on his hands. (TR 20-22)

Vocational Evidence

The parties do not dispute that Claimant performed modified and/or light duty work with Respondent at his regular wages from October 5, 1996, to December 18, 1996. Claimant also performed modified and/or light duty work with Respondent in 1997 during those periods for which Claimant is not seeking temporary total disability.

On September 29, 1997, Claimant underwent a placement evaluation for a vocational rehabilitation program under the California Workers' Compensation Act. (CX 9:65) Vocational testing was scheduled in order to identify Claimant's skills and aptitudes. A transferable skills analysis meeting was scheduled to determine Claimant's skills and abilities as they related to direct placement or on-the-job training. (CX 9:65) An October 30, 1997, vocational rehabilitation progress report indicated that the positions of Telecommunications Technician and Printing Press Operator had been identified as suitable for Claimant. (CX 9:69) A November 26, 1997, vocational rehabilitation progress report indicated Claimant had attended consultations with training facilities to obtain further information on the identified positions and Claimant had decided to pursue Printing Press Operator as a vocational objective. (CX 9:71)

On December 1, 1997, Claimant began vocational rehabilitation training to become a Printing Press Operator. The training was scheduled to run from December 1, 1997, to June 12, 1998. Claimant attended his training Monday through Friday from 7:00 a.m. to 1:00 p.m. at the Educational Cultural Complex Center. Claimant testified that he got up at 5:30 a.m. to make it to his training at 7:00 a.m. Claimant's vocational training consisted of both classroom work and

hands on training. (TR 15-17; CX 9:59) Claimant testified at the hearing that he was exhausted at the end of each day from standing, lifting, and operating machines and felt that he could not work part-time after his vocational training. (TR 17) Claimant also testified that after training he spent about two to three hours looking for employment as a printing press operator. (TR 26)

Claimant's vocational rehabilitation was interrupted on several occasions. A March 2, 1998, vocational rehabilitation progress report indicated Claimant's vocational rehabilitation was interrupted from February 25, 1998, to April 25, 1998, for his right carpal tunnel release. (CX 9:74) Claimant's vocational rehabilitation was also interrupted following his June 10, 1998, left carpal tunnel release. Further, an August 24, 1998, vocational rehabilitation progress report indicated Claimant's vocational rehabilitation was interrupted from August 24, 1998, to October 30, 1998, when Claimant was hired as an Instructional Aide at the Educational Cultural Complex.[2] The report indicated Claimant would resume his vocational training on November 2, 1998. (CX 9:78) Claimant's vocational rehabilitation ended on January 25, 1999. (CX 9:80)

In a Department of Labor Injured Worker's Rehabilitation Status Report, dated May 4, 1998, Nancy Henderson, a Vocational Rehabilitation Counselor, indicated that she spent 7.69 hours reviewing Claimant's state vocational rehabilitation program and indicated that the Department of Labor would be monitoring the services to ensure timeliness and quality. (CX 5:7)

Ms. Tanya Rutherford of RehabWest Inc., conducted an Employability and Wage Earning Capacity Evaluation to determine Claimant's employability status and wage earning potential in the San Diego labor market. Ms. Rutherford interviewed Claimant on September 10, 1997. (CX 18:114) Ms. Rutherford prepared an Employability Report, dated October 9 and October 20, 1997. (RX 18: 108-133) Ms. Rutherford conducted a labor market survey for seven positions and identified the following openings: (1) five openings as of September 25 and September 29, 1997, for the position of Light Maintenance/ Environmental Aide with a salary range starting from $5.10 to $6.50 per hour; (2) six openings as of September 25, 1997, for the position of Production/Assembly – Silkscreen with a salary range starting from $5.25 to $7.00 per hour; (3) four openings as of September 26 and September 30, 1997, for the position of Quality Control/Purchasing Shipping/Receiving with a salary range starting from $6.50 to $14.00 per hour; (4) six openings as of September 26 and September 29, 1997, for the position of Auto Parts Counter Clerk with a salary range starting from $5.50 to $8.00 per hour; (5) five openings as of September 26 and September 30, 1997, for the position of Print Shop Helper with a salary range starting from $6.00 to $9.00 per hour; (6) five openings as of September 26 and September 30, 1997, for the position of Lab Technician/Optical with a salary range starting from $6.00 to $6.50 per hour; and (7) four openings as of October 9, 1997, for the position of Parking Lot Attendant with a salary range starting from $5.25 to $6.25 per hour. (RX 18:120-132)

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[2] Claimant testified that as an Instructional Aide he earned $6.49 per hour and worked about 30 hours a week. At the hearing the parties stipulated that Claimant earned $172.16 per week. (TR 19) Claimant's 1998 W-2 from Zurich Payroll Solutions, Ltd. indicates Claimant earned a total of $1,904.82 during this time. (CX 10:82)

Ms. Rutherford prepared a Supplemental Employability and Wage Earning Capacity Evaluation on March 31, 1999. (RX 19:134-151) Ms. Rutherford conducted a labor market survey for seven positions and identified the following openings: (1) seven openings as of March 1, 1999, for the position of Printing Press Operator/Assistant with a salary range starting from $7.00 to $15.00 per hour; (2) seven openings as of March 1, 1999, for the position of Parking Lot Attendant with a salary range starting from $5.75 to $6.50 per hour; (3) six openings as of March 2 and March 9, 1999, for the position of Hotel/Motel Front Desk with a salary range starting from $6.50 to $8.00 per hour; (4) six openings as of March 5, 1999, for the position of Automotive Cashier/Counter Clerk with a salary range starting from $6.50 to $10.63 per hour; (5) seven openings as of March 5 and March 12, 1999, for the position of Production/ Manufacturing with a salary range starting from $6.00 to $10.00 per hour; (6) six openings as of March 8, 1999, for the position of Photo Lab Processor with a salary range starting from $6.00 to $10.00 per hour; and (7) six openings as of March 31, 1999, for the position of Customer Service with a salary range starting from $6.00 to $10.00 per hour. (RX 19:138-151)

At the hearing, Ms. Rutherford testified that there were part-time jobs available with at least 18 of the sites identified in her employability reports. (TR 47) Ms. Rutherford testified that part-time work typically involves four hours a day in the afternoon from 4:00 p.m. to 7:00 p.m. or on the weekends. (TR 48) In addition, at the hearing Claimant's attorney stated he would stipulate to the fact that the jobs on the employability reports submitted by Respondent were available. However, Claimant's attorney argued that Claimant was not able to work due to his involvement with vocational rehabilitation and his doctors. (TR 41-42)

Compensation

The LS-208[3] indicates that Respondent made voluntary payments to Claimant without an award at the rate of $372.53 per week from December 19, 1996, to December 21, 1996; from December 22, 1996, to December 25, 1996; from September 29, 1997, to October 5, 1997; from October 6, 1997, to November 2, 1997; from February 25, 1998, to May 3, 1998, and from June 10, 1998, to August 10, 1998. (RX 4:8(a)-8(c)). Respondent made voluntary payments to Claimant without an award at the rate of $140.00 per week from July 28, 1997, to September 28, 1997, and from January 26, 1999, to May 16, 1999. Respondent also made voluntary payments to Claimant without an award at the rate of $216.48 per week from November 3, 1997, to February 22, 1998, and from February 23, 1998, to January 25, 1999. (RX 4:8(a)-8(c)).

Claimant also received a lump sum settlement payment for a claim he filed under the California Workers' Compensation Act. The Compromise and Release, dated May 19, 1999, stated that the parties settled the claim for $19,500.00. Claimant's attorney requested total fees

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[3] The most current version of the LS-208 that was submitted at the hearing as Respondent's exhibit 4 was not legible; therefore, Respondent submitted an updated legible version of the LS-208, dated November 22, 1999. Claimant's attorney had no objection to the submission of the updated LS-208.

and costs in the amount of $2,340.00. (RX 9:27-31) After the fees and costs were deducted, the net settlement amount was $17,160.00.[4] (RX 9:27-31)

Analysis

Claimant contends that he should receive compensation for temporary total disability for the following time periods: from December 19, 1996, to December 25, 1996; from September 29, 1997, to August 15, 1998; and from November 1, 1998, to December 8, 1998. Claimant also contends that he should receive compensation for temporary partial disability from August 16, 1998, to October 31, 1998, at the rate of $257.09 per week. Further, Claimant contends that his carpal tunnel injuries should be considered a scheduled permanent partial disability to his arms under Section 8(c)(1) of the Act and that he has sustained a 28 percent permanent impairment rating in each arm. Respondent admits that Claimant was temporarily totally disabled from December 19, 1996, to December 25, 1996, and from September 29, 1997, to November 2, 1997. However, Respondent contends that Claimant was only temporarily partially disabled from November 3, 1997, to December 7, 1998, and should be compensated at the rate of $212.40 per week during this time. Respondent also contends that Claimant's carpal tunnel injuries should be considered a scheduled permanent partial disability to the hands under Section 8(c)(3) of the Act and Claimant has sustained, at most, a 7 ½ percent permanent impairment rating in each hand.

The Nature of Claimant's Injury

Claimant has the initial burden of proving the nature and extent of his disability. *Trask v. Lockheed Shipbuilding and Constr. Co.,* 17 BRBS 56 (1985). A residual disability is considered permanent when the employee's condition reaches the point of maximum medical improvement. *Stevens v. Director, OWCP,* 909 F.2d 1256, 23 BRBS 89 (CRT) (9th Cir. 1990); *James v. Pate Stevedoring Co.,* 22 BRBS 271 (1989). The parties in this case have stipulated that Claimant reached maximum medical improvement on December 8, 1998, and as a result I find that Claimant's disability was permanent in nature as of that date.

The Extent of Claimant's Injury

The next issue is whether Claimant's disability is total or partial in extent. In order to establish a *prima facie* case of total disability, a claimant must present evidence that he cannot return to his regular employment due to the effects of his work-related injury. *Elliot v. C&P Tel. Co.*, 16 BRBS 89 (1984). Once the claimant has established a *prima facie* case of total disability, the burden shifts to the employer to establish suitable alternate employment by showing the

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[4] The LS-208, dated November 22, 1999, indicates that Claimant was actually only paid $13,680.00 as a lump sum settlement of Claimant's state disability claim. (RX 4:8(d)) It is not clear what other amounts were deducted from the net settlement amount of $17,160.00. In summary, the LS-208 indicates that Respondent paid Claimant total compensation payments in the amount of $34,937.30. (RX 4:8(a)-8(d))

existence of realistically available job opportunities. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (CRT) (9th Cir. 1980).

The parties do not dispute that Claimant is entitled to compensation for temporary total disability from December 19, 1996, to December 25, 1996, and from September 29, 1997, to November 2, 1997, at the compensation rate of $372.53. However, the parties disagree as to Claimant's disability status from November 3, 1997, to December 7, 1998. The parties have stipulated that Claimant was unable to perform his regular work as a shipfitter with Respondent. As a result, the burden shifts to the Respondent to establish suitable alternate employment.

A claimant is entitled to receive compensation for temporary total disability while enrolled in a vocational rehabilitation program. *Louisiana Ins. Guar. Ass'n, v. Abbott*, 40 F.3d 122 (5th Cir. 1994); *Bush v. Director, OWCP*, 32 BRBS 213 (1998). Claimant was in a state vocational rehabilitation program that was monitored by the United States Department of Labor. Claimant attended vocational training Monday through Friday from 7:00 a.m. to 1:00 p.m., for a total of 30 hours per week. Claimant testified that he got up at 5:30 a.m. every morning to make it to his training at 7:30 a.m. Claimant's vocational rehabilitation consisted of both classroom work and hands on training. Claimant testified that he was exhausted at the end of each day from standing, lifting, and operating machines and felt that he could not work part-time after his training. At the hearing, Ms. Rutherford identified alternate employment and stated that typical part-time work would involve four hours a day from 4:00 p.m. to 7:00 p.m. or on weekends. Considering Claimant's physical condition, I find that it is unreasonable to expect Claimant to wake up at 5:30 a.m., attend vocational rehabilitation from 7:00 a.m. to 1:00 p.m, and then work part-time from 4:00 p.m. to 7:00 p.m. or to work on weekends. Further, I find it significant that during the time Claimant worked 30 hours a week as an Instructional Aide, the vocational counselors suspended his rehabilitation training. The suspension of Claimant's training suggests that the vocational rehabilitation counselors did not believe Claimant was capable of participating in both his vocational training and a part-time job. In addition, Claimant underwent right carpal tunnel release on February 25, 1998, and left carpal tunnel release on June 10, 1998, and was unable to attend training for several weeks following each surgery. For the above reasons, I find that Claimant was not capable of working a part-time job in addition to his vocational rehabilitation.

Therefore, I find that Claimant is entitled to compensation for temporary total disability from November 3, 1997,[5] to August 15, 1998, and from November 1, 1998, to December 7, 1998, at the rate of $372.53 per week. In addition, considering Claimant worked as an Instructional Aide from August 16, 1998, to October 31, 1998, I find that he is entitled to compensation for temporary partial disability during that time. The parties stipulated that

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[5] Although Claimant's vocational rehabilitation program did not officially begin until December 1, 1997, Claimant began participating in evaluations and consultations with training facilities on September 29, 1997, in order to determine his vocational goals. As a result, I find that he was not able to engage in alternate employment prior to the commencement of his rehabilitation on December 1, 1997.

Claimant earned $173.16 per week as an Instructional Aide. Therefore, I find that Claimant is entitled to compensation for temporary partial disability from August 16, 1998, to October 31, 1998, at the rate of $257.09 per week ($558.80 - $173.16 x 2/3).

Scheduled Permanent Partial Disability

Impairment of the hand or arm

The Board has held that injuries to the wrist may be considered as scheduled permanent partial disabilities to the arm[6] under Section 8(c)(1) rather than as a disability to the hand under Section 8(c)(3). *Scott v. Army Central Ins. Fund*, 30 BRBS 412(ALJ) (1996); *Sankey v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 886 (1978); *Hunigman v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 141 (1978). The Board has also held that a claimant is eligible for an award under Section 8(c)(1) where the injury occurred below the elbow. *Scott*, at 30 BRBS at 420. Further, the *AMA Guides* refer to carpal tunnel syndrome and loss of wrist motion as an "impairment of the upper extremity." *AMA Guides*, pages 35, 56; *Obrist v. Port of Portland*, 22 BRBS 333(ALJ) (1989).

In this case, Dr. Levine and Dr. Kennedy referred to Claimant's carpal tunnel syndrome as an impairment of the upper extremity. Dr. Levine's medical report indicated that following his carpal tunnel surgeries Claimant had limited range of motion in his wrists and decreased grip strength. Further, Claimant himself testified that following his carpal tunnel surgeries he still had pain in his hands, numbness in his fingers, cramping in his hands, lack of strength, and scar tissue on his hands. Therefore, considering the medical evidence and Claimant's credible testimony regarding pain and loss of function, I find it reasonable that Dr. Levine and Dr. Kennedy referred to Claimant's carpal tunnel injuries as an impairment of the upper extremities. Accordingly, I find that the effects of Claimant's carpal tunnel syndrome should be compensated as a scheduled disability to the arms under Section 8(c)(1).

Percentage of Impairment

The medical reports present conflicting opinions as to the percentage of impairment to Claimant's upper extremity. Although the fact-finder is not bound to accept the opinion of any particular medical examiner, the courts have held that a treating physician's opinion is entitled to special weight because he is employed to cure and has a greater opportunity to know and observe the patient as an individual. *Amos v. Director, OWCP*, 153 F.3d 1051, 1054 (9th Cir. 1998); *Pientrunti v. Director, OWCP*, 31 BRBS 84 (1997). If the treating doctor's opinion is

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[6] *Dorland's Medical Dictionary* states that the arm is popularly defined as the upper limb from the shoulder to the hand. *Dorland's Illustrated Medical Dictionary* page 120 (28th ed. 1994).

contradicted by another doctor, the fact-finder may not reject the opinion without providing specific and legitimate reasons that are supported by substantial evidence in the record. *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (citing *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995)). Further, an administrative law judge may base his finding of percentage of loss of use on one medical opinion where he considered all of the relevant medical evidence. *Rowley v. General Dynamics* Corp., 26 BRBS 696(ALJ) (1992); *Wright v. Superior Boat Works*, 16 BRBS 17, 19 (1983).

In this case, Dr. Levine treated Claimant prior to, during, and after his carpal tunnel surgeries and should be considered Claimant's treating physician. Dr. Levine's clinical findings revealed limited range of motion in Claimant's wrists and decreased grip strength. Dr. Levine concluded that Claimant had a 28 percent impairment of each upper extremity. Dr. Levine utilized Table 16 on page 57 of the *AMA Guides* which involves the rating for upper extremity impairment due to entrapment neuropathy. Dr. Levine found that Claimant had a moderate degree of impairment of the median wrist which results in a 20 percent upper extremity impairment and a mild degree of impairment of the ulnar wrist which results in a 10 percent upper extremity impairment. Dr. Levine then used the Combined Values Chart on page 322 of the *AMA Guides* to find that Claimant had a 28 percent impairment of each upper extremity. Despite Dr. Brigham's argument to the contrary, after reviewing Dr. Levine's report and the applicable sections of the *AMA Guides*, I find that Dr. Levine's method of computing Claimant's upper extremity impairment was in accordance with the provisions of the *AMA Guides*.

Further, Claimant testified consistently at his deposition and at the hearing that he did not see much improvement in his hand and wrist symptoms following his carpal tunnel surgeries. Claimant also testified at both his deposition and the hearing that he still had pain, numbness in his fingers, cramping in his hands, lack of strength, and scar tissue on his hands. Based upon Claimant's testimony and Dr. Levine's medical findings, I do not find Dr. Kennedy's opinion that Claimant had no residual impairment to be persuasive. In addition, I find that Dr. Brigham's opinion is questionable. Dr. Brigham did not examine Claimant. Dr. Brigham was hired by Respondent to provide a medical opinion for the hearing and his opinion is based solely upon the medical reports of Dr. Kennedy and Dr. Levine. As a result, I find the opinion of Dr. Levine to be more credible in this case. Based upon the opinion of Claimant's treating physician, Dr. Levine, and Claimant's testimony of the extent of his hand and wrist symptoms following his surgeries, I find that Claimant sustained a 28 percent impairment of each upper extremity as a result of the industrial injury on October 5, 1996.

It is well established that a scheduled award runs for the amount of time yielded by multiplying the number of weeks provided in the pertinent schedule provision by the percentage of the Claimant's impairment, and that Claimant receives weekly benefits based on the full compensation rate. *Scott v. Army Central Ins. Fund*, 30 BRBS 412(ALJ) (1996); *Macleod v. Bethlehem Steel Corp.*, 20 BRBS 234 , 237 n. 4 (1988). An injury resulting in permanent partial disability to the arm is compensated pursuant to the schedule at Section 8(c)(1). 33 U.S.C. § 908(c)(1). Under Section 8(c)(1), based upon the 28 percent impairment of each arm, Claimant is

entitled to two consecutive periods of scheduled permanent partial disability, each lasting 87.36 weeks (312 weeks x 28 percent). *See* 33 U.S.C. §§ 908(c)(1), 908(c)(22). Compensation is to be paid during these periods at the weekly rate of $372.53. The two consecutive periods were to have commenced on December 8, 1998, the date upon which Claimant's carpal tunnel syndrome was found to have reached a point of maximum medical improvement. *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1985).

Credit

The Act contains specific offset and credit provisions which prevent employees from receiving a double recovery for the same injury, disability, or death. Under Section 14(j), an employer is entitled to a credit for prior payments of compensation under the Act against any compensation subsequently found to be due. *Balzer v. General Dynamics Corp.*, 22 BRBS 447, 451 (1989); *Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413, 415 (1989). Under Section 3(e), an employer is entitled to a credit for any amounts paid to an employee under other workers' compensation laws or the Jones Act for the same injury, disability, or death for which benefits are claimed under the Act. *Bundens v. J.E. Brenneman Co. and Travelers Ins. Co.*, 28 BRBS 20 (1994); *see generally Ponder v. Peter Kiewit Sons' Co.*, 24 BRBS 46 (1990); *Shafer v. General Dynamics Corp.*, 23 BRBS 212 (1990). The amount of the credit is the net recovered by the employee excluding attorney fees and costs. *Bouchard v. General Dynamics Corp.*, 963 F.2d 541 (2d. Cir. 1992).

In this case, the LS-208, dated November 22, 1999, indicates that Respondent made previous payments of compensation to Claimant under the Act. In addition, the parties settled Claimant's state disability claim for $19,500.00. Following the deduction of the fees and costs, the net settlement amount was $17,160.00. Therefore, I find that Respondent is entitled to credit for compensation previously paid to Claimant under the Act and to credit for any compensation previously paid to Claimant pursuant to his state disability claim.

ORDER

1. Respondent shall pay Claimant temporary total disability compensation at the rate of $372.53 per week during the following periods: December 19, 1996, to December 25, 1996; from September 29, 1997, to November 2, 1997; and November 1, 1998, to December 7, 1998.

2. Respondent shall pay Claimant temporary partial disability compensation at the rate of $257.09 per week from August 16, 1998, to October 31, 1998.

3. Respondent shall pay Claimant compensation for permanent partial disability under the schedule of Section 908(c)(1) for a 28 percent loss of the use of each upper extremity, or 174.72 weeks of compensation (312 weeks x 28 percent x 2) at the rate of $372.53 per week as of December 8, 1998.

4. Respondent is entitled to credit for any compensation previously paid to Claimant under the Act and to credit for any compensation previously paid to Claimant pursuant to his state disability claim.

5. Interest on the amount owing is to be paid at the Treasury Bill rate in effect on the date this Decision and Order is filed by the District Director.

6. All calculations necessary for the payment of this award are to be made by the OWCP District Director.

7. Any petition for the allowance of attorney fees and costs must be prepared on a line item basis and in compliance with 20 C.F.R. § 702.132 and must be filed within 20 days after the service of this Decision and Order. Should a fee petition be filed, any objection shall be on a line item basis, stating the reasons for the objection, with explanation, and shall be filed within 10 days after receipt of the fee petition. Any item not objected to as directed shall be deemed without objection, and allowed. Within 10 days after receipt of any objection, Claimant's counsel may file a line item response.

EDWARD C. BURCH
Administrative Law Judge

Dated:
San Francisco, CA